

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

GARY JOHN HETTICK,

Debtor.

Case No. **04-60081-7**

DAVID J. MCCUE

NICOLE MCCUE,

Plaintiffs.

Adv No. **04-00072**

-VS-

GARY JOHN HETTICK,

Defendant.

MEMORANDUM OF DECISION

At Butte in said District this 28th day of January, 2005.

In this adversary proceeding the Plaintiffs David J. McCue and Nicole McCue (together “McCues”) filed a motion for default judgment, a motion to vacate Scheduling Order and immediately determine damages, and an application for their attorney’s fees incurred based upon the Defendant/Debtor Gary John Hettick’s (“Hettick”) failure to comply with Plaintiffs’ first discovery requests and this Court’s Order compelling Hettick to respond to discovery. After Hettick’s attorney W. Arthur Graham (“Graham”) withdrew as Hettick’s counsel of record, Hettick filed a response *in propria persona* in opposition and requested a hearing, which was held after due notice on December 9, 2004, on McCues’ motions and application. At the

conclusion of the hearing the Court took McCues' motions and application under advisement. After review of the record and applicable law, for the reasons set forth below McCues' motion for default judgment is denied but their request for sanctions and application for attorneys' fees is granted and sanctions are imposed against Hettick under Fed. R. Civ. P. 37(b)(2) (applying in adversary proceedings under F.R.B.P. 7037), McCues' motion for determination of damages is held in abeyance, the Scheduling Order is vacated and trial of this cause will be reset.

Plaintiffs were represented at the hearing by attorney Quentin M. Rhoades ("Rhoades"). Hettick appeared *pro se* and testified. Graham and his legal secretary Sheri Hills ("Hills") each also testified. Exhibits ("Ex.") 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, A, and B all were admitted into evidence without objection. Hettick stated at the hearing that he objects to Plaintiffs' application for attorneys' fees, but does not object to the truth or accuracy of the attorneys' fees set forth in Ex. 12, which is Plaintiffs' summation of legal services provided by their attorneys, and Hettick offered no testimony or evidence at hearing to refute Ex. 12. After the parties completed their cases-in-chief, the Court closed the record and took these matters under advisement. On January 10, 2005, the Court granted Plaintiffs' motion to suspend the discovery deadline. This memorandum contains this Court's findings of fact and conclusions of law.

The parties agree in their pleadings that this Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157, 1334 and 523, and that this is a core proceeding under 28 U.S.C. § 157(b)(2)(I). At issue is whether Hettick failed to make discovery, and what if any sanctions are appropriate under Rule 37(b).

FACTS

Hettick filed a voluntary Chapter 7 petition on January 15, 2004, and filed his Schedules and Statement of Financial Affairs on January 27, 2004, listing assets in the amount of \$12,375 and liabilities of \$202,719. McCues are not listed in Hettick's Schedules, and they were not sent the 11 U.S.C. § 341(a) notice of commencement of case and deadlines. Hettick amended his Statement of Financial Affairs on February 24, 2004, to show his income from self employment doing business as "H Construction" in year 2002 in the sum of \$349,554, and in 2003 of \$129,473. Schedule I stated he is no longer self employed, but earns \$700.00 per month from "misc. odd jobs".

The meeting of creditors was held pursuant to 11 U.S.C. § 341(a) on March 10, 2004, setting May 10, 2004, as the last day to file a complaint opposing discharge or dischargeability. A Discharge of Debtor was entered May 11, 2004.

McCues filed their complaint initiating this adversary proceeding on June 18, 2004. Their complaint avers claims for relief for breach of contract, fraud, negligent misrepresentation, violation of the Consumer Protection Act (Mont. Code Ann. § 30-14-102), constructive fraud, and exception from discharge under 11 U.S.C. §§ 523(a)(2)(A) for fraud and 523(a)(3)(B) for Hettick's failure to list or schedule their claim in time to permit McCues to timely file a proof of claim or dischargeability complaint, arising from payments made by McCues to Hettick for a construction of a home on their property in Florence, Montana.

Plaintiffs served discovery requests on Hettick on July 9, 2004. Ex. 1 are McCues' first discovery requests, which include after instructions and definitions fifteen (15) requests for admissions; seven (7) requests for production requesting among other things Hettick's invoices,

cancelled checks, bank records and correspondence related to work performed on McCues' property; and five (5) interrogatories requesting Hettick to identify documents and persons relevant to Hettick's work on their property, plus any transfers of real property by Hettick. Ex. 1 was served on Hettick's attorney of record Bruce M. Wilson on July 8, 2004. Ex. 1. On July 9, 2004, McCues' attorney served their discovery requests on Hettick personally at 4555 Kaniksu Ct., Missoula, MT 59801, the same street address as listed on his petition except for the zip code¹. McCues filed an amended notice of service of discovery on July 12, 2004. Ex. 2. No objection or request for protective order was ever filed by Hettick with respect to McCues' discovery requests.

Graham testified that Hettick was referred to him by another law firm, and he agreed to represent Hettick in this adversary proceeding. McCues' attorneyCarolynn M. Fagan ("Fagan") sent Graham a letter dated July 22, 2004, Ex. 3, including their first discovery requests and Plaintiffs' initial disclosures. Hettick filed an answer signed by Graham on August 31, 2004, admitting this Court has jurisdiction and that this is a core proceeding, but denying all liability, asserting affirmative defenses and praying for judgment for Defendant and an award of attorney's fees.

On September 8, 2004, Fagan sent Graham another letter, Ex. 4, advising Graham that Plaintiffs' had not received Hettick's responses to their discovery requests after almost 60 days since they were served on Hettick. Fagan gave Graham until September 13, 2004, to deliver discovery responses or Plaintiffs would file a motion to compel and request expenses and

¹Ex. 2 shows the zip code as 59803 where Hettick was served. Hettick's petition lists the zip code as 59801.

attorneys' fees. Ex. 4. Hettick did not provide responses to discovery by September 13, 2004, on which date Graham and Fagan had a telephone conversation and generated Ex. 5, consisting of Fagan's letter to Graham giving Hettick until noon on September 20, 2004, to provide discovery responses or Plaintiffs would file their motion to compel. On Ex. 5 Graham wrote on top to Fagan: "I concur with the matters set forth in this letter."

On September 21, 2004, Graham wrote to Fagan a cover letter, Ex. 6, with unsigned, incomplete responses to Plaintiffs' requests for admission and for production, Ex. 7 and Ex. 8, respectively. Ex. 7 and 8 are signed by Graham but not by Hettick. Ex. 7 includes responses to Plaintiffs' requests for admission. Graham testified that Hettick answered the requests for admission, albeit not fully.

Ex. 8 does not include any documents requested in Plaintiffs' first discovery requests. Graham states in Ex. 8 that the requests for production are not subject to objection, and that if all documents are not produced by 9:30 a.m. on September 27, 2004, Graham will seek leave to withdraw as Hettick's counsel. Nothing in the record shows that Hettick served any responses to Plaintiffs' interrogatories, and Graham testified that Hettick's response to interrogatories was a "total deficiency". Graham testified that Hettick had names of witnesses written on 3 in. by 5 in. cards with names and some phone numbers, and answers to other discovery requests written on a separate page, but there is no record they were delivered to Plaintiffs.

Also on September 21, 2004, Graham sent Hettick a letter advising him of the need to provide the information and documents requested, and enclosing "the responses I was able to formulate with sparse data from you." Ex. 13. Graham tells Hettick that the lawsuit is "a very serious matter", and that Hettick has "one more chance to help me defend this case" by bringing

to Graham's office by the end of the week "full and complete, honest, answers to all the discovery question", or Graham will file a motion to withdraw as his counsel. Ex. 13. Ex. 13 also discusses Graham's fee: "As well I should not remind you of the need to make payment every other Monday." Graham testified that he sent Hettick Ex. 13 for 2 reasons, i.e., first that he needed Hettick's documents to comply with Plaintiffs' discovery requests and protect his client from sanctions, and second because he did not know McCues' attorney Fagan and did not want her to think he was failing to comply with discovery.

Graham stated that in addition to his letters he made several phone calls to Hettick to try to get him to comply with discovery, both to Hettick's cell phone and his home phone where he testified he left messages with Hettick's spouse. Hills testified that Hettick's cell phone number is 546-9700, which Hettick did not dispute, and that Graham's phone records show calls to Hettick's cell phone on several dates. Ex. B². Despite his efforts, Graham testified that Hettick failed to respond both to his requests to comply with discovery, or to Plaintiffs' discovery requests.

On September 22, 2004, Plaintiffs filed a motion to compel Hettick to respond to Plaintiffs' discovery, including their interrogatories and requests for production. The Court entered an Order on September 23, 2004, ordering Hettick to produce complete responses to Plaintiffs' first discovery requests within ten (10) days, and advised Hettick that if responses are

²Ex. B shows calls between Graham and Hettick's cell phone # 546-9700 on 9/12/04, 9/13/04, 9/14/04, 9/15/04, 9/16/04, 9/17/04, 9/18/04, 9/20/04, 9/21/04, 9/22/04, 9/23/04, 9/24/04, 9/25/04, 9/26/04, 9/27/04, 9/28/04, 9/29/04, 9/30/04, 10/2/04, 10/3/04, 10/4/04, 10/5/04, 10/6/04, 10/7/04, 10/9/04, 10/12/04, 10/13/04, 10/14/04, 10/16/04, 10/18/04, 10/19/04, 10/20/04, 10/21/04, 10/22/04, 10/23/04, 10/24/04, and 10/25/04. On many of the foregoing dates, Ex. B shows multiple phone calls between Graham's office phone and Hettick's cell phone.

not produced within that time period: “Sanctions will be levied against Defendant. Sanctions may include entry of default judgment against Defendant and entry of fees and costs Plaintiffs incurred in pursuing the Motion to Compel.” That Order to compel was mailed by the Clerk³ directly to Hettick at his mailing address of record, as well as to Graham and Hettick’s bankruptcy attorney Wilson.

Graham testified that he had several conversations with Hettick about the need to produce documents and respond to Plaintiffs’ discovery requests, and that on September 27, 2004, Hettick came to his office without an appointment, bringing some checks and other documents, and left his business card with a note stating “Gary Hettick More Tomorrow”. Ex. 10, 10A. Graham and Hills both testified that Hettick told Graham he would bring in more documents the following day. Hettick testified that when he wrote “More Tomorrow” on Ex. 10A he intended to provide Graham with more documents, but did not produce more because he did not have any more. Graham testified that Hettick said he could not find some documents, including documents relating to his transaction with the Plaintiffs. Hettick testified that he was not aware that requested documents remained unproduced, that he is missing some of his documents and still does not have them. According to Hettick, he and Graham had a dispute about Graham’s unpaid attorney’s fees and Graham never told him about the need to produce more documents, and Hettick was not aware of the need to produce additional documents.

Hettick testified that Graham did not send him copies of discovery documents or correspondence with Plaintiffs’ attorneys. However, Ex. 6, 13 and 14 show that Graham kept

³P.O. Box 54, Lolo, MT 59847, is the address to which the Clerk mailed the Order, which is the same mailing address Hettick listed on his Chapter 7 petition.

Hettick fully informed of the requests for discovery, and the record shows that Plaintiffs' discovery requests were sent to Hettick directly, Ex. 2. On cross examination by Hettick, Hills testified that Graham needed from Hettick his bank statements, a more clear witness list, and answers to interrogatories.

On September 28, 2004, Graham wrote Hettick Ex. 14, a letter advising Hettick of the Order compelling discovery, which the Clerk had sent directly to Hettick. Hills testified that she sent Hettick a copy of the Order compelling discovery attached to a cover letter, Ex. 14. Graham reminded Hettick that he had indicated he would bring in more documents but nothing had been received, and Graham requested that Hettick bring in the documents immediately to comply. Ex. 14 also informs Hettick he is delinquent in paying Graham's fee and to pay \$800 immediately with another \$400 due on October 4. Ex. 14. Hettick testified that he told Graham that money was tight but that he would pay him⁴, but that he was still searching through his storage units for documents. Hills testified that Ex. 14 requested the additional documents which Hettick had promised to deliver for several weeks.

A pretrial scheduling conference was held on September 29, 2004, with Graham appearing for Defendant and Plaintiffs represented by Fagan. After hearing from counsel for the parties regarding scheduling, the Court entered an Order providing that discovery shall be completed by December 30, 2004, pretrial motions shall be filed by January 7, 2005, and trial was set for February 10, 2005. A copy of the Scheduling Order was sent directly to Hettick, in addition to Graham.

⁴On cross examination by Hettick, Graham agreed that Hettick had told him during an office visit in September 2004 that his truck transmission went out, with resulting expense.

Hills testified that Hettick called Graham's office on October 4, 2004, which she logged, and left a message stating he still did not have the required documents but would get them in and bring his bill current by October 12, 2004. She testified that she emailed Hettick's message to Graham, but did not hear from Hettick again. Prior to October 4, 2004, Hills testified, Hettick called Graham's office and said that he is still looking for documents, but is really busy working out of town and does not have enough time. No further discovery responses were delivered to Plaintiffs' counsel.

Hettick testified that he had nothing left to produce, and that he had given his bank records for January 2003 through June 2003 to Graham and did not have any other records. He testified that he called Graham on October 4, 2004, in the morning and explained that he did not have a checking account from January 2003 through January 2004 and so could not produce checking account records. While cross examining Hills, Hettick suggested that he wrote on his first set of discovery responses that he did not have a bank account, but Hills testified that she did not read his discovery responses and Hettick did not tell her that. Ex. 7 and 8 are the only responses to requests for admission and requests for production in the record. In addition to not being signed by Hettick, Ex. 7 fails to corroborate Hettick's testimony that he did not have a checking account. Ex. 8 was signed by Graham, but produced no documents.

Hettick testified that he is missing "tons" of documents for the first 6 months of 2003, as well as sheet rock, invoices and statements from his contracting business. Hettick took issue with Graham's statement on Ex. 10, p. 2 that "He simply did not give me the documents he said exist" by contending that Graham did not tell him what documents he wanted. Hettick testified that he was working long hours out of town at the time, and continued to look through his storage

for missing documents. Graham confirmed that Hettick said he had certain documents he could not find. Under cross examination by Hettick, who suggested that Graham stated that Graham would provide addresses of witnesses, Graham disagreed and testified that he told Hettick to go to UBC in person to find out where a particular witness worked.

On October 12, 2004, Plaintiffs filed a motion for default judgment. Graham moved to withdraw as Hettick's attorney on October 25, 2004, on the grounds Graham was not able to prepare proper disclosure because of Hettick's failure to provide documents, and for undue and unreasonable financial burden due to Hettick's failure to pay Graham's fees. Graham testified that he determined that Hettick would not comply with Plaintiffs' discovery requests, and he could not continue to represent him. The Court entered an Order on October 25, 2004, granting Graham's motion to withdraw as Defendant's counsel and advising Hettick that Plaintiffs' pending motions would be granted if he does not file a responsive pleading.

A Default Judgment was entered against Hettick on October 26, 2004, when Hettick failed to file a response to Plaintiffs' motion. Plaintiffs filed a motion to vacate the scheduling Order and to proceed directly to a determination of damages on October 29, 2004. Hettick filed a response on November 1, 2004, asking for a hearing and arguing that he gave Graham all the documents he had concerning the case, and stating he will need to hire another attorney to represent him. The Court vacated the Default Judgment on its own motion and set Plaintiffs' motions for hearing on December 9, 2004.

Plaintiffs filed their application for attorneys' fees on November 5, 2004, requesting fees in the amount of \$1,236.50 incurred in seeking their motion to compel and for default judgment, together with billing records. Ex. 12 is a summation of fees for Plaintiffs' counsel Rhoades and

Fagan, with dates, a description of the services provided, attorneys' initials, and time spent in this adversary proceeding in relation to Plaintiffs' motions to compel discovery, for default judgment, for determination of damages and application for fees. Upon review of Ex. 12 and Plaintiffs' application for fees filed November 5, 2004, the Court finds that adequate detail is provided that the \$1,236.50 in fees requested are reasonable. Hettick objected to Plaintiffs' application, but offered no evidence in opposition to the fees at the hearing, and stated that he did not object to the truth and accuracy of the representations on Ex. 12.

Hettick testified that he has sought to hire other counsel, who he identified as Harold V. Dye ("Dye"), but that Dye was too busy at the time to take up the case. No notice of appearance has been filed since the hearing on December 9, 2004, by Dye or any other attorney.

DISCUSSION

A. Contentions of the Parties.

Plaintiffs move for default judgment and attorneys' fees, and to proceed directly to a determination of damages based upon Hettick's failure to comply with this Court's Order compelling discovery based on Rule 37(a)(4) and Rule 37(b)(2)(C). Plaintiffs contend that the evidence admitted at hearing shows that Hettick's failure to comply was due to willfulness, bad faith or fault.

Hettick contends that Graham never told him what additional documents he needed to produce, that he cannot find all his documents despite searching for them, and that his dispute with Graham is really over his unpaid fees.

B. Rule 37 – Failure to Make Discovery – Sanctions.

Fed. R. Civ. P. 37 applies in adversary proceedings under F.R.B.P. 7037. If a party fails

to obey an order to provide or permit discovery, including an order compelling discovery entered under Rule 37(a), Rule 37(b)(2) and (d) authorize the court in which the action is pending, in its discretion, to “make any orders in regard to the failure as are just, including “rendering a judgment by default against the disobedient party”. Rule 37(b)(2)(C); *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112, 1115 (9th Cir. 2004); *see also Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 353-54, 29 S.Ct. 370, 53 L.Ed. 530 (1909) This Court in *In re Love*, 11 Mont. B.R. 490, 509-510 (Bankr. D. Mont. 1993), imposed sanctions for failure to respond to discovery even after a court order, noting that in *Matter of Visioneering Const.*, 661 F.2d 119, 123-24 (9th Cir. 1981) a debtor’s refusal to comply with discovery orders resulted in an entry of default.

Based upon the evidence in the record, including the discovery requests sent directly to Hettick, Ex. 1 and 2, Graham’s correspondence to Fagan which was cc’d to Hettick, Ex. 6, and correspondence directly to Hettick, Ex. 13 and 14, and this Court’s Order compelling Hettick to respond to discovery which was sent to Hettick both by the Clerk and by Graham, and the numerous meetings and phone calls between Graham and Hettick shown by the record, Ex. 10, 10A and Ex. B, this Court finds that Hettick has failed to comply with this Court’s Order compelling Hettick to produce complete responses to Plaintiffs’ discovery requests. In light of that overwhelming evidence, Hettick’s testimony that he did not know what documents Graham wanted is not credible or worthy of substantial probative weight.

Hettick was represented by Graham in this adversary proceeding until Graham withdrew. A person who has consulted with an attorney "can be charged with constructive knowledge of the law's requirements." *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 (9th Cir.1987). If Hettick had any question of how to comply with Plaintiffs’ discovery requests, he

should have sought clarification from his attorney. But regardless of whether or not he received clarification from his attorney, Hettick is charged with constructive knowledge of the requirement to comply with Plaintiffs' discovery requests and this Court's Order compelling discovery entered September 23, 2004. *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d at 1050.

The evidence shows that Graham in fact advised Hettick repeatedly of the need to comply with discovery, and that Hettick failed to comply. Of the first discovery requests, Hettick provided responses only to the requests for admission, and even those he failed to sign. Ex. 7. Ex. 8 and the rest of the record shows that Hettick produced nothing which was delivered to Plaintiffs in response to the requests for production. There is testimony that Hettick delivered some documents to Graham with the guarantee he would deliver more shortly, but no documents were delivered to Plaintiffs according to the evidence in the record. In order to demonstrate a good faith effort to comply, Hettick at least could have delivered whatever documents he had to Plaintiffs, with assurances he would supplement his discovery responses with additional documents as he located them. But Hettick produced nothing in response to Plaintiffs' requests for production. Likewise, the record shows Hettick completely failed to deliver to Plaintiffs responses to any of his interrogatories, which subjects him to sanctions under Rule 37(d).

Hettick's argument that his attorney Graham did not advise him which documents were required, and his testimony that the real reason for his failure to respond was because of a dispute with Graham over his unpaid fees, is simply irrelevant. Hettick cannot escape the effect of his failure to comply with a Court's Order compelling discovery responses by blaming his attorney. Hettick voluntarily selected Graham as his attorney of record, and he cannot now avoid the

consequences of the acts or omissions of his freely-selected attorney, even if Graham had failed to turn over complete discovery responses because of a fee dispute. *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 396-97, 113 S.Ct. 1489, 1499, 123 L.Ed.2d 74 (1993); *Link v. Wabash Co.*, 370 U.S. 626, 633-34 (1962); *In re Casey*, 193 B.R. 942, 949 (Bankr. S.D. Cal. 1996). The record shows that Hettick failed to provide complete responses to requests for production, and completely failed to provide Graham or the McCues any answers to their interrogatories. Hettick's failure to comply after an Order compelling discovery responses subjects him to sanctions under authority of Rule 37(b)(2), including by rendering judgment by default under Rule 37(b)(2)(C). This Court has the discretion to render a judgment by default against Hettick for his failure to comply. *Computer Task Group, Inc. v. Brothby*, 364 F.3d at 1115.

Hettick's present *pro se* status does not constitute grounds for relief. In the Ninth Circuit, ignorance of court rules does not constitute excusable neglect, even if a litigant appears *pro se*. *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9th Cir. 1997) (quoting *Swimmer v. IRS*, 811 F.2d 1343, 1345 (9th Cir. 1987)); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) ("Pro se litigants must follow the same rules of procedure that govern other litigants.").

In exercising its discretion, Rules 37(b) and (d) call upon a court to "make such orders in regard to the failure as are just and . . . justice requires that the most drastic sanctions be reserved for flagrant cases." Wright, Miller & Marcus, *FEDERAL PRACTICE AND PROCEDURE: Civil* 2d §2284. The Ninth Circuit has written that "[w]here the drastic sanctions of dismissal or default are imposed, however, the range of discretion is narrowed and the losing party's noncompliance must be due to willfulness, fault, or bad faith." *Computer Task Group, Inc. v. Brothby*, 364 F.3d

at 1115, *quoting Payne v. Exxon Corp.*, 121 F.3d 503, 507 (9th Cir. 1997), *quoting Henry v. Gill Industries*, 983 F.2d 943, 946 (9th Cir. 1993). If a failure to make discovery is because of inability to comply rather than because of willfulness, bad faith, or any fault of the party, an action should not be dismissed nor a default judgment rendered, and less severe sanctions are the most that should be invoked. Wright, Miller & Marcus, *FEDERAL PRACTICE AND PROCEDURE: Civil 2d* §2284.

In deciding whether a sanction of dismissal or default for noncompliance with discovery is appropriate, the court must weigh five factors: " '(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the [opposing party]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.' " *Computer Task Group, Inc. v. Brotby*, 364 F.3d at 1115, *quoting Payne v. Exxon Corp.*, 121 F.3d at 507, (quoting *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir.1987), *cert. denied*, 488 U.S. 819, 109 S.Ct. 59, 102 L.Ed.2d 37 (1988)).

“Where a court order is violated, the first and second factors will favor sanctions and the fourth will cut against them.” *Computer Task Group, Inc. v. Brotby*, 364 F.3d at 1115, *quoting Payne v. Exxon Corp.*, 121 F.3d at 507 (*quoting Adriana Int’l Corp. v. Thoeren*, 913 F.2d 1406, 1408 (9th Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S.Ct. 1019, 112 L.Ed.2d 1100 (1991)).

Addressing the third and fifth factors, although the Court concludes that it has the discretion to enter default judgment, and that entry of a default judgment would be warranted based upon Hettick’s failure to respond to requests for production, and complete failure to respond to Plaintiffs’ interrogatories, the Court finds that the risk of prejudice to the opposing parties and availability of less drastic sanctions, on balance, tip the scales against entry of a

default judgment at this time, but only if Hettick brings himself into compliance with the Court's Order compelling him to provide complete responses to Plaintiffs' discovery requests.

No prejudice to McCues is shown by the record if default judgment is denied and this case proceeds to trial on the merits. Certain bank records were not produced, but Hettick testified that he has lost substantial amounts of his documents. In particular, Hettick testified that he could not produce checking account records for the period from January 2003 to January 2004 because he did not have a checking account during that period. No evidence was admitted to the contrary, and McCues cannot be prejudiced by failure to produce bank records for an account that never existed. McCues did not produce any other evidence of the risk of prejudice, and indeed indicated a willingness to conduct further discovery, including a deposition of Hettick, in their motion to suspend discovery deadline. The third factor weighs on balance against default, if Hettick brings himself in compliance.

On the other hand, Hettick failed to comply with discovery despite his attorney's increasingly urgent requests that he produce documents and comply. Hettick's testimony that Graham did not tell him which documents he needed is at odds with Graham's letter to him, Ex. 13 and 14, which were admitted without objection, and is not credible or worthy of probative weight in light of the fact that the Plaintiffs' discovery requests were sent directly to Hettick's street address before he hired Graham. This Court's Order compelling Hettick to respond to discovery also was sent directly to Hettick at his mailing address of record.

The final factor, availability of less drastic sanctions, weighs against default at this time. For now, the Court will grant McCues' application for attorneys' fees and enter Judgment against Hettick in the amount of \$1,236.50 as sanctions for Hettick's failure to comply with this Court's

Order compelling Hettick to respond to discovery. In the interests of justice, the Court will not at this time order entry of Judgment by Default against Hettick, as it could in its discretion under Rule 37(b)(2)(C). *Computer Task Group, Inc. v. Brotby*, 364 F.3d at 1115. This could, however, be only a temporary respite if Hettick continues to refuse to fully respond to Plaintiffs' discovery requests as provided under the applicable Rules of Procedure. Hettick's failure to comply with this Court's Order has resulted in imposition of sanctions below which, if Hettick persists in his defiance, may result in this Court's imposition of more drastic sanctions under Rule 37(b)(2)(C), which may include a judgment by default, if these less drastic sanctions fail to bring about Hettick's compliance. For that reason, the Court will hold McCues' motion to vacate Scheduling Order and proceed directly to a determination of damages in abeyance at this time.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157, 1334 and 523.
2. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).
3. Plaintiffs satisfied their burden of proof to show that the Defendant failed to comply with their first discovery requests and this Court's Order entered September 23, 2004, compelling Defendant to produce complete responses to discovery, and sanctions against the Defendant are appropriate under F.R.B.P. 7037 and Fed. R. Civ. P. 37(b)(2) and Rule 37(d).
4. The Court concludes in the exercise of its discretion under Rule 37(b)(2) that rendering judgment by default against the Defendant is not appropriate at this time because of the availability of lesser sanctions and lack of prejudice shown to the Plaintiffs.
5. Plaintiffs' application for an award of attorneys' fees in the amount of \$1,236.50 is

supported by adequate detail of the services for which fees are requested, and the Court finds that an award of \$1,236.50 to Plaintiffs is reasonable and appropriate in the exercise of the Court's discretion under Rule 37(b)(2) and Rule 37(d) for Defendant's failure to comply with discovery requests and this Court's Order.

IT IS ORDERED a separate Order and Judgment shall be entered in accordance with the above, granting Plaintiffs' motion in part and awarding Plaintiffs attorneys' fees against the Defendant Gary John Hettick in the amount of \$1,236.50 under F.R.B.P. 7037 and Fed. R. Civ. P. 37(b)(2)(C) and Rule 37(b)(4) as sanctions against the Defendant for his failure to comply with Plaintiffs' discovery requests and this Court's Order compelling discovery entered September 23, 2004; and resetting pretrial deadlines and the trial date.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana